No. 07-1282

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

SHERRYL ANN SNODGRASS,

Petitioner,

v.

ELIZABETH ROBINSON, Chair of the Iowa Board of Parole, in her individual and official capacity; KAREN MUELHAUPT, Vice Chair of the Iowa Board of Parole, in her individual and official capacity; RICHARD S. BORDWELL, Member, Iowa Board of Parole, in his individual and official capacity; CURTIS S. JENKINS, Member, Iowa Board of Parole, in his individual and official capacity; BARBARA BINNIE, Member, Iowa Board of Parole, in her individual and official capacity; IOWA BOARD OF PAROLE; and CHESTER J. CULVER, Governor of Iowa,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Respondents' opposition brief cites three *per curiam* decisions of the Fifth Circuit Court of Appeals that are in direct conflict with the decision of the Eighth Circuit Court of Appeals in the present case. Brief in Opp., pp. 14-15. These three unreported decisions were issued by three different three-judge panels in January 2008, February 2008, and March 2008, respectively. Each of the three opinions distinguishes *Dunn v. Maggio*, 712 F.2d 998 (5th Cir. 1983), which rejected a prisoner's *ex post facto* challenge to the 1979 repeal of a statute that previously had governed the commutation process in Louisiana; and each vacates a district court's judgment dismissing a prisoner's complaint that the retroactive application to him of LA.REV.STAT. ANN. § 15:574.2(D), which establishes multi-year waiting periods between successive commutation applications by inmates serving life sentences, violates the *Ex Post Facto* Clause of Article I § 10 of the United States Constitution. The critical paragraphs in these three opinions are nearly identical:

> In *Dunn v. Maggio*, 712 F.2d 998, 1001-02 (5th Cir. 1983), this court rejected a claim that the repeal of LA.REV.STAT. ANN. § 15:571.7, which contained provisions pertaining to the process by which a prisoner sentenced to life imprisonment may obtain a commutation of his sentence, constituted a violation of the Ex Post Facto Clause. However, the court in *Dunn* did not resolve the

issue central to the instant case, which is whether the application to [plaintiff-appellant] of current Louisiana law governing the pardon and sentence commutation process violates the Ex Post Facto Clause.

The Supreme Court, in *Garner v. Jones*, 529 U.S. 244, 255 (2000) and in *California Dept. of Corr. v. Morales*, 514 U.S. 499 (1995), has issued decisions addressing substantially similar claims challenging the application of changes in the timing of parole reconsideration hearings as violative of the Ex Post Facto Clause. Under the principles of the above cases, to state a claim on which relief could be granted [plaintiff-appellant] was required to plead facts that would show that, "as applied to his own sentence," the new laws governing the process for obtaining a pardon or commutation of his sentence "created a significant risk of increasing his punishment." *See Garner*, 529 U.S. at 255.

Considering the above authorities, relevant Louisiana statutory provisions, and the allegations of [the plaintiff-appellant's] complaint, we have determined that [plaintiff-appellant] has stated a claim on which relief can be granted. Accordingly, [plaintiff-appellant's] IFP motion is granted, the judgment of the district court is vacated, and the matter is remanded to the district court for further proceedings.

Howard v. Blanco, No. 07-30046, 2008 WL 118367, at 2 (5th Cir., Jan. 14, 2008) (parallel citations omitted). *See also Sears v. Blanco*, No. 07-30246, 2008 WL 552501, at 1-2 (5th Cir., Feb. 29, 2008); *Mason v. Blanco*, No. 07-30367, 2008 WL 687292, at 1-2 (5th Cir., Mar. 13, 2008).

Rather puzzlingly, respondents assert that "these cases will provide the Fifth Circuit Court of Appeals an opportunity to reassess its ruling in *Dunn v. Maggio* and provide its own detailed insight into the applicability of *Morales* and *Garner* to commutation proceedings." Brief in Opp., p. 14. In fact, three different panels of the Fifth Circuit have already concluded – in these cases – that the principles established in *Morales* and *Garner are* applicable to commutation proceedings. Further, each of these panels has explicitly held that *Dunn v. Maggio* "did *not* resolve the issue central to [each of these cases], which is whether the application [to the plaintiff-appellants] of current Louisiana law governing the pardon and sentence commutation process violates the Ex Post Facto Clause." *See Howard* at 2; *Sears* at 1; *Mason* at 1 (emphasis added).

Respondents' opposition brief argues that "[i]t is appropriate for [this] Court to defer taking up the issue of retroactive application of amended commutation procedures until such time as the Fifth Circuit decides that *Dunn v. Maggio* should be reversed in view of this Court's recent *ex post facto* pronouncements." Brief in Opp., pp. 14-15. It appears, however,

that "such time" is unlikely to arrive soon, if ever. Not only have three different Fifth Circuit panels, comprising seven different judges, concluded that *Dunn* is irrelevant to controversies like the one currently before this Court, but nothing in the opinions produced by these panels remotely suggests that the twenty-five-year-old precedent established by *Dunn* should be overturned. Perhaps even more tellingly, a relatively recent *per curiam* decision by another three-judge panel of the Fifth Circuit specifically reaffirms the holding of *Dunn*. *See Nero v. Blanco*, No. 07-30043, 2007 WL 4375521 (5th Cir., Dec. 12, 2007).

In short, there is no merit to respondents' suggestion that this Court should stay its hand in the present case and await yet an additional decision from the Fifth Circuit, which has already made it abundantly clear that, in its view, the retroactive application of "new laws governing the process for obtaining a pardon or commutation of [a life] sentence" may violate the *Ex Post Facto* Clause. *See Howard* at 2; *Sears* at 2; *Mason* at 1. The issues between petitioner, on one hand, and the Iowa Board of Parole and the Governor of Iowa, on the other, are clearly drawn and ripe for decision by this Court. Petitioner respectfully

requests that her petition for a writ of certiorari be granted.

Respectfully submitted,

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